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Preparatory Commission for the International Criminal Court
Working Group on Elements of Crimes
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Request from the Governments of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea and South Africa and the Permanent Observer Mission of Switzerland to the United Nations regarding the text prepared by the International Committee of the Red Cross on article 8, paragraph 2 (b), (c) and (e), of the Rome Statute of the International Criminal Court*

Note verbale dated 4 August 1999 from the Permanent Missions of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea and South Africa to the United Nations and the Permanent Observer Mission of Switzerland to the United Nations addressed to the Secretary-General

The Permanent Missions of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea and South Africa to the United Nations and the Permanent Observer Mission of Switzerland to the United Nations have the honour to attach the text of a paper prepared by the International Committee of the Red Cross (see annex) in order to assist the Preparatory Commission in elaborating the text on the elements of crimes for the Court. The material in the paper relates to the crimes listed in article 8, paragraph 2 (b), of the Statute.

The Permanent Missions of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea and South Africa and the Permanent Observer Mission of Switzerland to the United Nations request the circulation of the present note verbale and its annex as a document of the Preparatory Commission.

* The annex to the present document is issued in the language of submission only.

99-22869 (E)

Annex

Paper prepared by the International Committee of the Red Cross relating to the crimes listed in article 8, paragraph 2 (b) (xvii), (xviii), (xix), (xx), (xxiii), (xxiv) and (xxv) of the Rome Statute of the International Criminal Court

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INTRODUCTION

It was agreed during the Diplomatic Conference on the Establishment of an International Criminal Court, held in Rome from 15 June to 17 July 1998, that a draft text on the elements of the crime of genocide, crimes against humanity and war crimes was to be prepared by the Preparatory Commission. In this respect, Article 9 of the Statute of the International Criminal Court (the "ICC Statute") states that the *"[e]lements of crimes shall assist the Court in the interpretation and application of Articles 6, 7, and 8. They shall be adopted by [...] the members of the Assembly of States Parties"*. This paper is intended to assist the Preparatory Commission in preparing the text on the elements of crime for Article 8 (2) solely by presenting relevant sources and indicating the results that emerge from these sources. It does not reflect any decision taken at a previous session of the Preparatory Commission. Part VI deals exclusively with specific war crimes as listed in Article 8 (2) (b) of the ICC Statute.

The review of sources consisted in an exhaustive research and analysis of the relevant case law and international humanitarian law and human rights law instruments. As regards case law, a review of cases from the Leipzig Trials, from post Second World War trials, including the Nuremberg and Tokyo trials as well as national case law, and decisions from the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda was done. National case law on war crimes was examined when it was available in English, French or German. Decisions from international and regional Human Rights bodies were also analysed for further clarification on certain offences. It is important to note that the various sources referred to in this paper were selected solely in an objective manner and based on their relevance and shall not be seen as a reflection of any particular view or position. In contrast to the previous parts of the study, the ICRC had to rely to a greater degree on legal writings and views expressed in military manuals, since the conduct of hostilities, dealt with in the crimes analysed in this part of the study, so far has only rarely been the subject of international or national case law.

The paper is structured in the following manner. First, the results from the sources are outlined for each offence listed under Article 8 (2) (b) of the Statute. The term "material element" is used to describe the *actus reus* of the offence (the act or omission) and "mental element" to describe the *mens rea* or necessary intent to commit the offence. Second, a commentary containing an analysis of the various sources under review shows the legal basis for the results indicated.

It is important to note that this paper does not deal with the responsibilities of commanders, superiors and subordinates (Art. 28 ICC Statute) nor questions concerning crimes committed by incitement, attempt, conspiracy or other forms of assistance (Art. 25 ICC Statute).

ABBREVIATIONS

The following abbreviations are used throughout this paper:

ACHPR:	African Charter on Human and Peoples' Rights
A.D.:	Annual Digest and Reports of Public International Law Cases
AP I:	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977
AP II:	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977
ICCPR:	International Covenant on Civil and Political Rights
ECHR:	European Court of Human Rights
GAOR:	General Assembly Official Records
GC:	Refers to all four (4) Geneva Conventions
GC I:	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
GC II:	Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949
GC III:	Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949
GC IV:	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949
IACHR:	Inter-American Commission (or Court) on Human Rights
IAYHR:	Inter-American Yearbook on Human Rights
ICC:	International Criminal Court
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the former Yugoslavia
ILM:	International Legal Materials

ILR:	International Law Reports
UN Doc.:	United Nations Document
UNGA Res.:	United Nations General Assembly Resolution
WCC:	War Crimes Commission

Article 8 Paragraph 2 (b) ICC Statute

- OTHER SERIOUS VIOLATIONS OF THE LAWS AND CUSTOMS APPLICABLE IN INTERNATIONAL ARMED CONFLICT -

General points common to the offences under Article 8 (2) (b) of the ICC Statute

(1) The conduct is committed in the context of an international armed conflict.

For the Commentary see Part III of the ICRC Study dealing with other crimes under Art. 8 (2) (b) of the Statute.

Comments on specific offences

General remarks relevant to all offences

- With respect to the terms "unlawful" or "lawful", as used in the elements of several offences, it is important to emphasise that they refer to the lawfulness under international law. This was repeatedly stated in various post Second World War Trials (*"contrary to the laws and usages of war"*) as has been shown in Part I of this study.

- The notion "wilful" includes "intent" and "recklessness", but excludes ordinary negligence. The term "knowingly" must be understood in the sense of Art. 30 ICC Statute, which defines "knowledge" as meaning awareness that a factual circumstance exists or a consequence, will occur in the ordinary course of events (cf. Art. 30 (3)).

Art. 8 (2) (b) (xvii) - Employing poison or poisoned weapons

1. Results from the sources

Material elements

(1) The perpetrator employed poison or poisoned weapons.

Mental element

(2) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The terms "Employing poison or poisoned weapons" are directly derived from Art. 23 (a) of the Hague Regulations.

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. However, certain other sources may be helpful in interpreting various elements of this offence.

The prohibition of poison is probably the most ancient prohibition of a means of combat in international law. Since the late Middle Ages the use of poison has always been strictly prohibited.[1] An early reference of this prohibition is found in Art. 70 of the Lieber Code from 1863:

> *"The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war."*

aa) Remarks concerning the material element

Although there are different interpretations on the meaning of "poison or poisoned weapons", it must be indicated that there is at least a considerable overlap with the offence in Art. 8 (2) (b) (xviii) - Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices.[2] This connection was noted by both the Tokyo District Court in the *Shimoda Case* and the ICJ Advisory opinion on the legality of the threat or use of nuclear weapons, in which both indicated that the prohibition of poison has not been interpreted widely so as to encompass nuclear weapons.[3]

With regard to the ordinary meaning of the word "poison", the following definitions may be useful:

The term "poison" is defined in the Cambridge International Dictionary of English as *"a substance that causes illness or death if taken into a living thing, esp. a person's or animal's body"*.[4]

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1 Sandoz, Des armes interdites en droit de la guerre, 1975, pp. 11 *et seq.*; Oeter, in: Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflicts, p. 138.

2 See Oppenheim, International Law, A Treatise, Vol. II, 7th ed., 1952, p. 342; Sandoz, Des armes interdites en droit de la guerre, 1975, p. 28, concludes that asphyxiating gases are poison; Oeter, in: Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflicts, p. 148, establishes that the prohibition of poisonous gases is included in the prohibition of poison or poisoned weapons. Greenspan, The Modern Law of Land Warfare, Berkeley/Los Angeles, 1959, p. 359, referring to Art. 23 (a) of the Hague Regulations states: *"Gas and bacteriological warfare may be regarded as particular instances of infringements against the general prohibition of poison or poisoned weapons in war"*.

3 *Ryuichi Shimoda et al. v. The State*, ILR Vol. 32, para. 2 (11); ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, paras. 55 *et seq.* See, however, Dissenting Opinion of Judge Weeramantry. III. 12. and Dissenting Opinion of Judge Koroma.

4 Cambridge International Dictionary of English, 1995, p. 1090.

According to The Oxford English Dictionary "poison" means:

"Any substance which, when introduced into or absorbed by a living organism, destroys life or injures health, irrespective of mechanical means or direct thermal changes. Popularly applied to a substance capable of destroying life by rapid action, and when taken in small quantity."[5]

N.B.:

- The Oxford Manual on the Laws of War on Land drafted by the Institute of International Law 9 September 1880[6] states in Art. 8:

  "It is forbidden:
  (a) To make use of poison, in any form whatever."

- The U.S. Military Manual defines poison in the following terms:

  "Poisons are biological or chemical substances causing death or disability with permanent effects when, in even small quantities, they are ingested, enter the lungs or bloodstream, or touch the skin."[7]

- The British and the Canadian Military Manuals state with regard to the prohibition of poison:

  "Water in wells, pumps, pipes, reservoirs, lakes, rivers and the like, from which the enemy may draw drinking water, must not be poisoned or contaminated. The poisoning or contamination of water is not made lawful by posting up a notice informing the enemy that the water has been thus polluted."[8]

- The German Military Manual provides in this regard:

  "The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials, or similar devices is prohibited (GasProt 1925; Art. 23 lit. a HagueReg). This prohibition also applies to toxic contamination of water-supply installations and foodstuffs (Art. 54, para. 2 AP I; Art. 14 AP II) and the use of irritant agents for military purposes. This prohibition does not apply to unintentional and insignificant poisonous secondary effects of otherwise permissible munitions."[9]

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5 The Oxford English Dictionary, vol. VII, Oxford, 1933 (reprinted in 1978), p. 1056.

6 With respect to the legal value of this Manual it is worth citing the following paragraph from the preface:
"The Institute, too, does not propose an international treaty, which might perhaps be premature or at least very difficult to obtain; but, being bound by its by-laws to work, among other things, for the observation of the laws of war, it believes it is fulfilling a duty in offering to the governments a 'Manual' suitable as the basis for national legislation in each State, and in accord with both the progress of juridical science and the needs of civilized armies.
Rash and extreme rules will not, furthermore, be found therein. The Institute has not sought innovations in drawing up the 'Manual'; it has contented itself with stating clearly and codifying the accepted ideas of our age so far as this has appeared allowable and practicable."

7 Department of the Air Force, AF Pamphlet 110-31, International Law - The Conduct of Armed Conflict and Air Operations, 1976, p. 6-5.

8 The Law of War on Land being Part III of the Manual of Military Law, 1958, p. 42. See also Canadian Law of Armed Conflict Manual, 2nd Draft, 1986, p. 5-18.

9 Joint Services Regulation (ZDv) 15/2, 1992, no. 434. See also Strupp, Das Internationale Landkriegsrecht, 1914, p. 58; Greenspan, The Modern Law of Land Warfare, Berkeley/Los Angeles, 1959, p. 317.

bb) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

Art. 8 (2) (b) (xviii) - Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices

1. Results from the sources

Material elements

(1) The perpetrator employed asphyxiating, poisonous or other gases, or analogous liquids, materials or devices.

Mental element

(2) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The terms "Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices" are directly derived from the 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (*"use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices"*), which reaffirmed *inter alia* the Declaration (IV, 2) concerning Asphyxiating Gases, The Hague, 29 July 1899: *"The Contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases."* As Oppenheim points out, the *"Declaration gave expression, in this particular sphere, to the customary rules prohibiting the use of poison and of material causing unnecessary suffering"*,[10] which had been codified in Arts. 23 (a) and 23 (c) of the Hague Regulations. After the use of gases in World War I, articles in various peace treaties reiterated and in some respects enlarged the prohibition embodied in the 1899 Declaration. For example, Art. 171 of the 1919 Treaty of Versailles stated: *"The use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited [...]"*. Therefore, the preamble of the 1925 Geneva Protocol indicates that it reaffirmed an existing rule:

> *"Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices, has been justly condemned by the general opinion of the civilized world; and*
> *Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and*
> *To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;"*

[10] Oppenheim, International Law, A Treatise, Vol. II, 7th ed., 1952, p. 342.

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. However, certain other sources may be helpful in interpreting various elements of this offence.

aa) Remarks concerning the material element

As indicated above, States have elaborated on the prohibition of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices in the context of the above-mentioned international legal instruments.

The 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare indicates that it extends the scope of the prohibition to bacteriological agents:

> *"That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration."*

Therefore, one might conclude that these agents are not included in the prohibition as stated in the ICC Statute. However, it should be indicated that the use of such agents would probably amount to an attack on civilians within the meaning of Art. 8 (2) (b) (i) of the ICC Statute because of the impossibility of biological agents being able to distinguish between civilians and combatants.

Since the 1925 Geneva Protocol includes the prohibition of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, it is useful for the determination of the elements of the crime as defined under the ICC Statute to look at the interpretations given to the original rule as reaffirmed in the said Protocol.

An explanation of the interpretation of the 1925 Protocol is given in the German Military Manual:

> *"The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials, or similar devices is prohibited (GasProt 1925; Art. 23 lit. a HagueReg). This prohibition also applies to toxic contamination of water-supply installations and foodstuffs (art. 54, para. 2 AP I; Art. 14 AP II) and the use of irritant agents for military purposes. This prohibition does not apply to unintentional and insignificant poisonous secondary effects of otherwise permissible munitions."*[11]

The Commentary to this rule further clarifies:

> *"There is no dispute to the basic rule: the use of chemical weapons is prohibited. A prohibition on wartime use of potentially lethal substances, which cause asphyxiating or poisoning effects, had already been codified in Art. 23 lit. a of the Hague Regulations (prohibition against using poison or poisoned weapons [...]). [...]*

[11] Joint Services Regulation (ZDv) 15/2, 1992, no. 434.

The Geneva Protocol of 17 June 1925 for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare thus consolidated the general prohibition of poisonous weapons in 1925 and explicitly outlawed all use of the gas weapon [...].
The general prohibition against the use of poisonous gases - which now constitutes a rule of customary law - applies not only to their direct use against enemy combatants, but extends also to the toxic contamination of water-supply installations and foodstuffs. This could in theory be deduced from the pre-existing general prohibition of poison and poisoned weapons in Art. 23 lit. a Hague Regulations; nowadays it is expressly provided for in Arts. 54, para. 2 AP I and 14 AP II [...].
Concerning the category of 'irritant agents', which is included in the scope of the prohibition by sentence 2 of the above-cited Section 434 of the Manual, it should be noted that a serious dispute continues as to whether these substances were covered by the traditional prohibition of chemical weapons. [...] Art. 1, para. 5 of the Chemical Weapons Convention of 1993 now settles the controversy by explicitly prohibiting the use of 'irritant' agents in warfare [...] The most important point concerning all these disputes about the definition of 'poisonous gases' (clarified to a large extent by the new Chemical Weapons Convention) is the intentional design of a weapon in order to inflict poisoning as a means of combat. Only in so far as the poisoning effect is the intended result of the use of the substances concerned does the use of such munitions qualify as a use of 'poisonous gases'. If the asphyxiating or poisoning effect is merely a side-effect of a physical mechanism intended principally to cause totally different results (as e.g. the use of nuclear weapons), then the relevant munition does not constitute a 'poisonous gas'."[12]

Spaight indicates:

"The Gas Protocol prohibits [...] not only poisonous and asphyxiating gases but also 'other gases' and (to emphasise the comprehensiveness of the prohibition) 'all analogous liquids, materials or devices.' It condemns, therefore, not only lethal but also non-toxic or anaesthetic gases. The argument that, because the effect of a gas is not to kill but merely to stupefy temporarily those within its radius of action, its use is permissible, cannot be sustained in face of the definite terms of the treaty. [...]"[13]

For further interpretations see Rousseau, Le droit des conflits armés, Paris, 1983, pp. 119 *et seq.*

With regard to whether nuclear weapons are forbidden by virtue of the prohibitions in the 1925 Protocol, the ICJ, in its advisory opinion on the legality of the threat or use of nuclear weapons, held:

"[...] Nor does the 1925 Protocol specify the meaning to be given to the term "analogous materials or devices". The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.

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12 Oeter, in: Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflicts, pp. 148 *et seq.* (footnotes omitted).

13 Spaight, Air Power and War Rights, 3rd ed., 1947, quoted in: Whiteman, Digest of International Law, Vol. 10, Washington, 1968, p. 459.

In view of this, it does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of the above-mentioned provisions of the Second Hague Declaration of 1899, [...] or the 1925 Protocol [...]."[14]

bb) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

Art. 8 (2) (b) (xix) - Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions

1. Results from the sources

Material elements

(1) The perpetrator employed bullets which expand or flatten easily in the human body.

Mental element

(2) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The terms "Employing bullets which expand or flatten easily in the human body" are directly derived from the Declaration (IV, 3) concerning Expanding Bullets, The Hague, 29 July 1899 (*"The Contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions."*; the authentic French text reads as follows: *"Les Puissances contractantes s'interdisent l'emploi de balles qui s'épanouissent ou s'aplatissent facilement dans le corps humain, telles que les balles à enveloppe dure dont l'enveloppe ne couvrirait pas entièrement le noyau ou serait pourvue d'incisions."*).

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. However, certain other sources may be helpful in interpreting various elements of this offence.

[14] ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, paras. 55 *et seq.* See, however, Dissenting Opinion of Judge Weeramantry, III. 12, and Dissenting Opinion of Judge Koroma.

aa) Remarks concerning the material element

In the German Military Manual it is stated:

> *"It is prohibited to use bullets which expand or flatten easily in the human body (e.g. dum-dum bullets) (Declaration Concerning Expanding Bullets of 1899) This applies also to the use of shotguns, since shot causes similar suffering unjustified from the military point of view. It is also prohibited to use projectiles of a nature*
> *- to burst or deform while penetrating the human body;*
> *- to tumble early in the body; or*
> *- to cause shock waves leading to extensive tissue damage or even lethal shock (Arts. 35, para. 2 and 51, para. 4, lit. c AP I; Art. 23 lit. e Hague Regulations)."*[15]

The commentary thereto explains:

> *"One could reasonably argue, as the German administration for example does, that the use of shotguns has essentially to be regarded as prohibited under these provisions, since shot inflicts extremely painful wounds which cause grave difficulties in medical treatment, but is not much more efficient in its effects than normal infantry munition. Nevertheless, no real consensus has developed on this issue. The same could be said of other variants of recently developed infantry weapons and munitions which cause excessive injuries without achieving particularly impressive military advantages: projectiles which burst or deform while penetrating the human body: projectiles which tumble early in the human body (causing particularly severe internal injuries); and weapons and munitions which cause shock waves leading to extensive tissue damage or even lethal shock. The analogy with the dum-dum bullets outlawed in 1899 is obvious, and a prohibition under the general ground of 'excessive suffering' suggests itself; [...]"*[16]

The German interpretation may be of relevance also with regard to this war crime under the ICC Statute. The words "such as" in Art. 8 (2) (b) (xix) of the ICC Statute clearly indicate that the list of prohibited bullets is not exhaustive, but illustrative. With regard to the test to be applied to other types of bullets the preamble of The Hague Declaration, which is the basis of this crime, gives further guidance by stating that

> *"[t]he undersigned [were] inspired by the sentiments which found expression in the Declaration of St. Petersburg of 29 November (11 December) 1868".*

These "sentiments" are expressed in the St. Petersburg Declaration in the following manner:

> *"Considering:*
> *That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;*
> *That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;*
> *That for this purpose it is sufficient to disable the greatest possible number of men;*
> *That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;*

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15 Joint Services Regulation (ZDv) 15/2, 1992, no. 407.

16 Oeter, in: Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflicts, p. 123.

That the employment of such arms would, therefore, be contrary to the laws of humanity;"

On the basis of this, one might conclude that the intentions of the St. Petersburg Declaration, which are still valid, although not necessarily the technical specifications laid down at that time, must be considered in evaluating other bullets which might also fall under this crime.

The importance of the intentions of the St. Petersburg Declaration was also stressed at a recent Expert Meeting in Geneva (29-30 March 1999) organized by the ICRC on exploding bullets. There was a general consensus that:

- the prohibition on the intentional use against combatants of bullets which explode upon impact with the human body, which originated in the 1868 St. Petersburg Declaration, continues to be valid.
- the targeting of combatants with such bullets, the foreseeable effect of which is to explode upon impact with the human body, would be contrary to the object and purpose of the St. Petersburg Declaration.
- there is no military requirement for a bullet designed to explode upon impact with the human body.

Analysing the legality of a particular bullet, which would *"explode on impact in a human body if it meets any degree of resistance, such as personnel equipment, an armored vest, or bone"*, the U.S. Department of the Army concluded that a bullet *"that will explode on impact with the human body would be prohibited by the law of war from use for antipersonnel purposes"*.[17]

bb) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

Art. 8 (2) (b) (xx) - Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123

1. Results from the sources

Material elements

(1) The perpetrator employed a weapon, projectile or material or a method of warfare as listed in the [Annex to the ICC Statute].

[17] Memorandum for US Army Armament Research, Development and Engineering Center, 19 February 1998.

Mental element

(2) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The terms "weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering" are directly derived from Art. 35 (2) AP I (Art. 23 (e) of the 1907 Hague Regulations). The terms "weapons, projectiles and material and methods of warfare which are inherently indiscriminate in violation of the international law of armed conflict" are based on the concepts as expressed in Arts. 48 and 51 (4) and (5) AP I.

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on whether a specific means of warfare is of a nature to cause superfluous injury or unnecessary suffering or inherently indiscriminate. However, the Statute does not give such general jurisdiction to the Court because the specific weapons need to be agreed on in an Annex. However, the remarks below give some guidance on how States may choose to add specific weapons based on the two customary rules indicated.

aa) Remarks concerning the material element

Before going into more detail on the substance of the two customary rules, it is worth quoting the ICJ with regard to conceptual matters:

> *"The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use. [...]*
> *In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.*

It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (I.C.J. Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."[18]

(1) Weapons of a nature to cause superfluous injury or unnecessary suffering

There are only very few clear statements in the relevant sources that particular weapons, projectiles and material and methods of warfare are of a nature to cause superfluous injury or unnecessary suffering. For example the British and the U.S. Military Manuals indicate:

"Under this heading [prohibition to employ arms, projectiles or material calculated to cause unnecessary suffering] may be included such weapons as lances with a barged head, irregularly-shaped bullets, projectiles filled with broken glass, and the like. The scoring of the surface of bullets, the filing off of the end of their hard case, and the smearing on them of any substance likely to inflame a wound, are also prohibited."[19]

In the Commentary to the German Military Manual it is stated that the prohibition of weapons *"the primary effect of which is to injure by fragments which in the human body escape detection by X-rays"*[20] *"is the only specific prohibition of a weapon in the tradition of [...] Art. 23, lit. e HagueReg which met unanimous approval by state representatives [...]."*[21] However it indicates also that the *"prohibition of poisoned weapons and the use of poison as a means of warfare, which had been so deeply rooted in medieval custom, could be seen as a precursor. [...] The bans on the use of poisonous gases as a means of warfare provided for by the Geneva Gas Protocol of 1925 and the Biological Weapons Convention of 1972 were further steps on the way to a total ban on the use of certain particularly barbaric weapons. [...]"*[22]

The U.S. Airforce Pamphlet states:

"International agreements may give specific content to the principle in the form of specific agreements to refrain from the use of particular weapons or methods of warfare. Thus, international law has condemned dum dum or exploding bullets because of types of injuries and inevitability of death. Usage and practice has also determined that it is per se illegal to use projectiles filled with glass or other materials inherently difficult to detect medically, to use any substance on projectiles that tend unnecessarily to inflame the wound they cause, to score the surface or to

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18 ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, para. 78 *et seq.*

19 The Law of War on Land being Part III of the Manual of Military Law, 1958, p. 41; Department of the Army Field Manual, FM 27-10, The Law of Land Warfare, 1956, p. 18.

20 See Protocol I to the UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.

21 Oeter, in: Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflicts, p. 123.

22 Oeter, in: Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflicts, pp. 113 *et seq.*

file off the ends of the hard cases of bullets which cause them to expand upon contact and thus aggravate the wound they cause."[23]

The Australian Defence Force, Operation Series, Commander's Guide, states:

"Both chemical and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion. [...]
Munitions which produce fragments undetectable by X-ray machines, such as glass, are prohibited based upon the principle of unnecessary suffering. [...]
Hollow point weapons are prohibited because they cause gaping wounds which lead to unnecessary suffering. Issued weapons and ammunition should never be altered."[24]

The Manual of the USSR from 1990 indicated:

"Prohibited means of warfare include various kinds of weapons of indiscriminate character and/or those that cause unnecessary suffering:
a) bullets that expand or flatten easily in the human body;
b) projectiles used with the only purpose to spread asphyxiating or poisonous gases;
c) projectiles weighing less that 400 grams, which are either explosive or charged with fulminating or inflammable substances;
d) poisons or poisoned weapons;
e) asphyxiating, poisonous or other similar gases and bacteriological means;
f) bacteriological (biological) and toxin weapons;
g) environmental modification techniques having widespread, long-term or serious effects as means of destruction, damage or injury;
[...]"[25]

The ICRC Commentary from 1986 contains the following statement:

"The specific applications of the prohibition formulated in Article 23, paragraph 1 (e), of the Hague Regulations, or resulting from the Declarations of St. Petersburg and The Hague, are not very numerous. They include:
1. explosive bullets and projectiles filled with glass, but not explosives contained in artillery missiles, mines, rockets and hand grenades;
2. "dum-dum" bullets, i.e., bullets which easily expand or flatten in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions or bullets of irregular shape or with a hollowed out nose;
3. poison and poisoned weapons, as well as any substance intended to aggravate a wound;
4. asphyxiating or deleterious gases;
5. bayonets with a serrated edge, and lances with barbed heads;
6. hunting shotguns are the object of some controversy, depending on the nature of the ammunition and its effect on a soft target."[26]

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23 Department of the Air Force, AF Pamphlet 110-31, International Law - The Conduct of Armed Conflict and Air Operations, 1976, p. 6-2.

24 Australian Defence Force, Operation Series, Commander's Guide, ADFP 37 Suppl. 1, pp. 3-1 et seq.

25 Manual on the Application of the Rules of International Humanitarian Law by Armed Forces of the USSR, Appendix to Order of the USSR Defence Minister, No. 75, 1990, para. 6.

26 De Preux, in: Commentary on the AP, Art. 35, No. 1419, pp. 404 *et seq.*

Later on, it also states:

> *"Fragmentation projectiles of which the fragments cannot be traced by X-rays are prohibited as they are of a nature to cause superfluous injury or unnecessary suffering."*[27]
> *"Napalm, small-calibre projectiles, and certain blast and fragmentation weapons can also result in superfluous injury or unnecessary suffering, in the sense of the provision contained in this article, even though up to now no regulations have been adopted on this subject."*[28]

Since then, other weapons have been mentioned as violating the rule prohibiting the use of weapons of a nature to cause unnecessary suffering or superfluous injury. Especially, there is support among experts that the anti-personnel use of laser weapons to blind would be against that rule.[29] Blinding laser weapons are now prohibited by treaty[30] because of their inhumane effects although not all States were of the view that they were already prohibited by virtue of this customary rule.

Furthermore, the preamble of the Ottawa Treaty[31] states:

> *"Basing themselves on the principle of international humanitarian law [...] that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and on the principle that a distinction must be made between civilians and combatants".*

This statement may be an indication that anti-personnel mines might also be considered as weapons of a nature to cause superfluous injury or unnecessary suffering.

From a more conceptual point of view, the finding of the Court in the *Shimoda Case* is of particular interest:

> *"[...] judging from the fact that the St. Petersburg Declaration declares that '... considering that the use of a weapon which increases uselessly the pain of people who are already placed out of the battle and causes their death necessarily is beyond the scope of this purpose, and considering that the use of such a weapon is thus contrary to humanity ...' and that article 23 (e) of the Hague Regulations respecting War on Land prohibits 'the employment of such arms, projectiles, and materials as cause unnecessary injury', we can safely see that besides poison, poison-gas and bacterium the use of the means of injuring the enemy which causes at least the same or more injury is prohibited by international law."*[32]

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27 *Ibid.*, No. 1435, p. 409. Oeter, in: Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflicts, p. 123.

28 *Ibid.*, No. 1438, p. 409.

29 Oeter, in: Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflicts, p. 116.

30 Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects), 13 October 1995.

31 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997.

32 ***Ryuichi Shimoda et al. v. The State***, ILR Vol. 32, para. 2 (11).

Since the application of this war crime under the ICC Statute depends on the elaboration and acceptance by State Parties of an annex naming the weapons prohibited, going beyond the sources generally referred to in this study, it seems to be useful to indicate general tools for making judgements on particular weapons.

Since 1868 the principle that the only legitimate purpose of war is to weaken the military forces of an opponent has been an accepted element of international humanitarian law.[33] At that time it was established that this purpose would be served by disabling enemy combatants and that it would *"be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable"*.[34] This principle has been reaffirmed in various international instruments in the form of a prohibition on the use of "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering".[35] In 1996 the International Court of Justice stated that this rule constitutes one of the *"intransgressible principles of international customary law"* and is a fundamental rule *"to be observed by all States"*.[36]

The notion of "superfluous injury and unnecessary suffering"[37] relates to the design-dependent effects of specific weapons *"of a nature to cause"*[38] these effects. Although much of humanitarian law is aimed at protecting civilians from the effects of armed conflict, this rule of customary international law constitutes one of the few measures intended to protect combatants from certain weapons which are deemed abhorrent or which inflict more suffering that required for their military purpose.

The International Committee of the Red Cross has proposed as a tool, to help in making judgments as to whether specific weapons may cause superfluous injury and unnecessary suffering, the use of an objective study of the health effects of weapons used in conflicts during the past 50 years, as contained in the SIrUS Project[39]. The group of experts who worked on the SIrUS Project, most of whom were health professionals, collated data relating to the effects of weapons used in conflicts over the last 50 years. These data originated from both military medical publications and the ICRC wound database of 26,636 weapon injured.

From these data, the expert group found that the measurable effects of weapons which cause injury by explosions or projectiles but which do not target a specific part of the body as a function of their design:

- do not cause a field mortality of more than 22 % nor a hospital mortality of more than 5 %;

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33 Even before 1868, a prohibition of poison or poisoned weapons had been part of ancient laws of war in India, Greece, Rome, and the Middle East based on their excessive effects. The 1863 'Lieber Instructions' to Federal forces in the US civil war also *"wholly excluded"* this means of warfare on the same basis.

34 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St. Petersburg, Russia, 29 November/11 December 1868.

35 Art. 35 (2) AP I.

36 ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, No. 95, para. 79.

37 Both terms are translations from the single French concept of *"maux superflus"* contained in the 1899 and 1907 Hague Regulations (Art. 23 (e)). The French term contains both elements of the English terms.

38 This term is translated from the original French *"propres à causer"* which is the sole authentic version of the 1899 and 1907 Hague Regulations (Art. 23 (e)). The term was incorrectly translated into the English "calculated to cause" in the 1907 Hague Regulations (IV) which introduced a subjective element of the weapon designer's intention. This error was corrected when the original "of a nature to cause" was restated in Art. 35 (2) AP I.

39 SIrUS = **S**uperfluous **I**njury or **U**nnecessary **S**uffering.

- cause grade 3 wounds (as measured by the Red Cross wound classification) in less than 10 % of those who survive to hospital; and
- can be treated for the most part by well established medical and surgical methods.

Therefore, the SIrUS Project has established that the following effects of weapons on humans have NOT been seen commonly as a result of armed conflicts in the last five decades:

- disease other than that resulting from physical trauma from explosions or projectiles;
- abnormal physiological state or abnormal psychological state (other than the expected response to trauma from explosions or projectiles);
- permanent disability specific to the kind of weapon (with the exception of the effects of point-detonated antipersonnel mines - now widely prohibited);
- disfigurement specific to the kind of weapon;
- inevitable or virtually inevitable death in the field or a high hospital mortality level;
- grade 3 wounds among those who survive to hospital;
- effects for which there is no well-recognized and proven medical treatment which can be applied in a well-equipped field hospital.

High mortality or large wounds can obviously be caused by legitimate weapons such as rifle bullets and fragmentation munitions under certain circumstances. Whether an individual is wounded slightly, wounded severely or killed by such weapons is determined by 1) the design of a weapon, 2) how it is used and 3) random factors such as his or her proximity to the detonation (of a munition) and the part of the body that is hit. The data in the SIrUS Project about the effects of weapons commonly used in recent conflicts take all these factors into account.

On the other hand, some weapons can be expected to inflict certain effects virtually all the time. These effects result specifically from the nature or technology of the weapon i.e., they are **design-dependen**: Examples include: exploding bullets which would usually be lethal or cause grade 3 limb wounds; chemical and biological weapons which inflict specific disease or abnormal physiological states; blinding laser weapons which cause specific permanent disability to the eyes and effects for which there is no proven medical treatment; and "point-detonated" antipersonnel mines which result in a severe (grade 3) injury to the foot or leg which in turn results in specific disability and disfigurement.

As the rule prohibiting superfluous injury or unnecessary suffering requires an evaluation that the injury or suffering is excessive compared with the military value, the ICRC has proposed the following method of evaluation:

- establish whether the weapon in question would cause any of the above effects as a function of its design (i.e. the effects listed as having not been seen commonly in armed conflicts over the last 50 years) and if so:
- weigh the military utility of the weapon against these effects, and
- determine whether the same purpose could reasonably be achieved by other lawful means that do not have such effects.[40]

[40] ICRC, The SIrUS Project and reviewing the legality of new weapons, Background Paper prepared by the International Committee of the Red Cross, June 1999.

(2) Weapons that are inherently indiscriminate

Such weapons are described in Art. 51 (4) (b) and (c) AP I which establish absolute standards (indicated by the word "cannot"):

> *"Indiscriminate attacks are:*
> *[...]*
> *(b) those which employ a method or means of combat which* ***cannot*** *be directed at a specific military objective; or*
> *(c) those which employ a method or means of combat the effects of which* ***cannot*** *be limited as required by this Protocol; [...]."* (emphasis added)

As in the case of weapons of a nature to cause superfluous injury or unnecessary suffering, there are only very few clear statements in the relevant sources that particular weapons are inherently indiscriminate.

According to the ICRC Commentary to Art. 51 (4) (b),

> *"As regards the weapons, those relevant here are primarily long-range missiles which cannot be aimed exactly at the objective. The V2 rockets used at the end of the Second World War are an example of this."*[41]

Later on it states under the title of Art. 51 (4) (c):

> *"[...] there are some weapons which by their very nature have an indiscriminate effect. The example of bacteriological means of warfare is an obvious illustration of this point. There are also other weapons which have similar indiscriminate effects, such as poisoning sources of drinking water."*[42]

Solf refers to the following:

> *"Attaching incendiary or antipersonnel bombs to free floating balloons, or using long range missiles with only a rudimentary guidance system are examples of this type of weapon."*[43]

The U.S. Air Force Pamphlet states:

> *"Indiscriminate weapons are those incapable of being controlled, through design or function, and thus can not, with any degree of certainty, be directed at military objectives. For example, in World War II German V-1 rockets, with extremely primitive guidance systems yet generally directed towards civilian populations, and Japanese incendiary balloons without any guidance systems were regarded as unlawful. [...] Biological warfare is a universally agreed illustration of such an indiscriminate weapon. Uncontrollable effects, in this context, may include injury to the civilian population. Uncontrollable refers to effects which escape in time or*

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41 Pilloud/Pictet, in: Commentary on the AP, Art. 51, No. 1958, p. 621. See also Swedish Ministry of Defence (ed.), International Humanitarian Law in Armed Conflict, 1991, p. 45.

42 Pilloud/Pictet in: Commentary on the AP, Art. 51, No. 1965, p. 623.

43 Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 51, p. 305.

space from the control of the user as to necessarily create risks to civilian persons or objects excessive in relation to the military advantage anticipated."[44]

The Australian Defence Force, Operation Series, Commander's Guide, indicates:

"Both chemical and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion. [...]
Because of their potential to be indiscriminate in application, poison and poisoned weapons are prohibited."[45]

The Manual of the USSR from 1990 indicated:

"Prohibited means of warfare include various kinds of weapons of indiscriminate character and/or those that cause unnecessary suffering:
a) bullets that expand or flatten easily in the human body;
b) projectiles used with the only purpose to spread asphyxiating or poisonous gases;
c) projectiles weighing less that 400 grams, which are either explosive or charged with fulminating or inflammable substances;
d) poisons or poisoned weapons;
e) asphyxiating, poisonous or other similar gases and bacteriological means;
f) bacteriological (biological) and toxin weapons;
g) environmental modification techniques having widespread, long-term or serious effects as means of destruction, damage or injury;
[...]"[46]

The preamble of the Ottawa Treaty states:

"Basing themselves on the principle of internati nal humanitarian law that [...] that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and ***on the principle that a distinction must be made between civilians and combatants"*** (emphasis added).

This statement may be an indication that anti-personnel mines might also be weapons that are inherently indiscriminate or at least weapons that, by their nature, produce indiscriminate effects.[47] Equally, a number of States stated during the years leading up to the adoption of the Ottawa Treaty that they considered anti-personnel mines to be indiscriminate weapons.

Greenspan states in this regard:

"Mines in the nature of booby traps are, in general, to be condemned, since usually they are indiscriminate in dealing out death and injury."[48]

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[44] Department of the Air Force, AF Pamphlet 110-31, International Law - The Conduct of Armed Conflict and Air Operations, 1976, p. 6-3. See also *ibid.*, p. 6-4, on biological weapons.

[45] Australian Defence Force, Operation Series, Commander's Guide, ADFP 37 Suppl. 1, pp. 3-1 et seq.

[46] Manual on the Application of the Rules of International Humanitarian Law by Armed Forces of the USSR, Appendix to Order of the USSR Defence Minister, No. 75, 1990, para. 6.

[47] See also with respect to dumb mines Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts, Commentary to the AP, Art. 51, p. 305.

[48] Greenspan, The Modern Law of Land Warfare, Berkeley/Los Angeles, 1959, p. 363.

The rule prohibiting the use of indiscriminate weapons was also addressed in the Advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons. The ICJ as a whole judged the rule to be customary and introduced it in the Opinion as follows:

> *"States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets."*[49]

The Court thus equated the use of indiscriminate weapons with a deliberate attack on civilians.[50] Following this holding, any weapon can be tested against these criteria and if it falls foul of them, its use would be prohibited without there being a need for any special treaty or even State practice prohibiting the use of that particular weapon.

It is crucial to determine what precisely the Court meant by *"incapable of distinguishing between civilian and military targets"*. It is obvious that a weapon, being an inanimate object, cannot itself make such a distinction, for this process requires thought. The above-cited language of Art. 51 (4) (b) and (c) AP I is more accurate in this regard.

The Protocol presents two possibilities in sub-paragraphs (b) and (c), either of which would render the weapon illegal. The phrase used in the Opinion - *"incapable of distinguishing between civilian and military targets"* - could apply to either or both. It may be argued that weapons do violate the first criterion, i.e., that they cannot be aimed at a specific military objective, if in fact what one is referring to is the accuracy of the delivery system.

The second test in Art. 51 (4) AP I would render a weapon unlawful if its effects *"cannot be limited as required by this Protocol"*, which presumably means, especially in the light of the paragraph's final phrase, that the effects do not otherwise violate the principle of distinction.

However, the meaning of this rule is not undisputed. One hypothesis could be the other criteria of "indiscriminate attacks" found in Art. 51 (5) AP I, which in effect can be translated as the principle of proportionality (sub-para. (b)) and the prohibition of area bombardment (sub-para. (a)). Both of these incontestably are customary law rules. Although not impossible, it is very difficult to use proportionality to test whether a weapon is indiscriminate in nature. To do so, one would have to decide in advance if any use of the weapon in question would inevitably lead to civilian casualties or civilian damage which would be excessive in relation to any military objective that could be attacked using that weapon. As far as the prohibition of area bombardment is concerned, this rule, as formulated in the Protocol, would also be difficult to use as a test, for the words of Art. 51 (5) (a) AP I presuppose the intention to attack several distinct military objectives in a populated area, treating them as if they were one objective. One cannot assume this when deciding on the nature of any particular weapon. Since the wording of Art. 51 (4) (c) AP I ("cannot be limited") suggests an absolute standard, while Art. 51 (5) (a) and (b) AP I refer to the circumstances of a particular attack, one might have doubts whether this hypothesis is correct.

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[49] ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, para. 78.

[50] See also in this regard Judge Higgins who clearly stated:

> *"The requirement that a weapon be capable of differentiating between military and civilian targets is not a general principle of humanitarian law specified in the 1899, 1907 or 1949 law, but flows from the basic rule that civilians may not be the target of attack.",*
>
> **Dissenting Opinion of Judge Higgins, para. 24.**

The second hypothesis is not to try to find the answer in other parts of Art. 51 of the Protocol, but rather to decide on the basis of the essential meaning of the principle of distinction. This principle presupposes the choice of targets and weapons in order to achieve a particular objective that is lawful under humanitarian law and that respects the difference between civilian persons and objects on the one hand, and combatants and military targets on the other. This requires both planning and a sufficient degree of foreseeability of the effects of attacks. Indeed, the principle of proportionality itself requires expected outcomes to be evaluated before the attack. None of this is possible if the weapon in question has effects which are totally unforeseeable, because, for example, they depend on the effect of the weather. It is submitted that the second test of "indiscriminate weapons" is meant to cover cases such as these, where the weapon, even when targeted accurately and functioning correctly, is likely to take on "a life of its own" and randomly hit combatants or civilians to a significant degree.

In this regard the following indications contained in the ICJ Advisory Opinion on nuclear weapons as well as the separate and dissenting opinions of the judges may be of particular interest.

For a decision on the indiscriminate character of nuclear weapons, the Court's findings on their nature became pivotal. On the basis of the scientific evidence presented to the Court, it concluded in the Opinion that:

> *"In applying this law to the present case, the Court cannot [...] fail to take into account certain unique characteristics of nuclear weapons [...]*
> *[...] nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom.* ***By its very nature*** *that process [...] releases not only immense quantities of heat and energy, but also powerful and prolonged radiation [...] These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons* ***cannot be contained in either space or time****. They have the potential to destroy all civilisation and the entire ecosystem of the planet [...]*
> *The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations."*[51] (emphasis added)

In its Opinion, the Court assessed nuclear weapons' legality as follows:

> *"[...] the principles and rules of law applicable in armed conflict - at the heart of which is the overriding consideration of humanity - make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear*

[51] ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, para. 35.

weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance."[52]

The logic between the last two sentences in this quotation is unclear. More insight on the judges understanding of the term "indiscriminate" may be found in the individual judges' analyses of whether a nuclear weapons are by their nature indiscriminate.

Three judges seem to have decided that nuclear weapons are not necessarily indiscriminate in nature, by using only the first criterion derived from Art. 51 (4) (b) AP I, i.e., when considering the accuracy of the delivery system, at least certain types of nuclear weapons can be aimed at a specific military objective. Of these, only Judge Higgins in her Dissenting Opinion attempted to define indiscriminate weapons, as follows:

"it may be concluded that a weapon will be unlawful per se *if it is incapable of being targeted at a military objective only, even if collateral harm occurs."*[53]

On applying this to nuclear weapons she said:

"Notwithstanding the unique and profoundly destructive characteristics of all nuclear weapons, that very term covers a variety of weapons which are not monolithic in their effects. To the extent that a specific nuclear weapon would be incapable of this distinction, its use would be unlawful."[54]

Judge Guillaume did not add much to the definition given by the Court and gave no reasons whatsoever for his conclusion as regards nuclear weapons in his Separate Opinion, in which he stated:

"Customary humanitarian law [...] contains only one absolute prohibition: the prohibition of so-called "blind" weapons which are incapable of distinguishing between civilian targets and military targets. But nuclear weapons obviously do not necessarily fall into this category. [...]
With regard to nuclear weapons of mass destruction, it is clear however that the damage which they are likely to cause is such that their use could not be envisaged except in extreme cases."[55]

The third judge, Vice-President Schwebel, stated:

"While it is not difficult to conclude that the principles of international humanitarian law - [...] discrimination between military and civilian targets - govern the use of nuclear weapons, it does not follow that the application of those principles [...] is easy."[56]

However, as Judge Schwebel then went on to speculate on different types of uses and which of these might be lawful or not, it is clear that he too decided that nuclear weapons are not by nature indiscriminate:

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52 ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, para. 95.
53 Dissenting Opinion of Judge Higgins, para. 24.
54 *Ibid.*
55 Individual Opinion of Judge Guillaume, para. 5.
56 Dissenting Opinion of Vice-President Schwebel.

"The use of nuclear weapons is, for the reasons examined above, exceptionally difficult to reconcile with the rules of international law applicable in armed conflict, particularly the principles and rules of international humanitarian law. But that is by no means to say that the use of nuclear weapons, in any and all circumstances, would necessarily and invariably conflict with those rules of international law."[57]

Among the eight judges who stated that the use of any type of nuclear weapon would infringe the rules of humanitarian law, some referred explicitly to the rule prohibiting indiscriminate weapons. They seemed to base their positions primarily on the extensive destructive nature of these weapons, and in particular the radiation that uncontrollably affects civilians and combatants alike. It is particularly worth citing three of the judges who voted in favour of the Opinion:

Judge Fleischhauer stated that

"[t]he nuclear weapon is, in many ways, the negation of the humanitarian considerations underlying the law applicable in armed conflict [...] the nuclear weapon cannot distinguish between civilian and military targets".[58]

President Bedjaoui found that

"[n]uclear weapons can be expected - in the present state of scientific development at least - to cause indiscriminate victims among combatants and non-combatants alike [...] The very nature of this blind weapon therefore has a destabilizing effect on humanitarian law which regulates discernment in the type of weapon used. Until scientists are able to develop a "clean" nuclear weapon which would distinguish between combatants and non-combatants, nuclear weapons will clearly have indiscriminate effects and constitute an absolute challenge to humanitarian law. Atomic warfare and humanitarian law therefore appear to be mutually exclusive: the existence of the one automatically implies the non-existence of the other."[59]

Judge Herczegh wrote that

"[t]he fundamental principles of international humanitarian law, rightly emphasized in the reasons of the advisory opinion, categorically and unequivocally prohibit the use of weapons of mass destruction, including nuclear weapons. International humanitarian law does not recognize any exceptions to these principles."[60]

Judge Weeramantry - dissenting from the advisory opinion - elaborated his conceptual view on the rule in greater detail. He stated *inter alia*:

"However, the nuclear weapon is such that non-discrimination is built into its very nature. A weapon that can flatten a city and achieve by itself the destruction caused by thousands of individual bombs, is not a weapon that discriminates. The radiation

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57 *Ibid.*

58 Separate Opinion of Judge Fleischhauer, para. 2.

59 Declaration of President Bedjaoui, para. 20.

60 Declaration of Mr. Herczegh.

it releases over immense areas does not discriminate between combatant and non-combatant, or indeed between combatant and neutral states."[61]

In this context he made reference to a resolution of the International Law Institute, passed at its Edinburgh Conference in 1969. The acts described as prohibited by *existing law* included the following:

"[...] the use of all weapons which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of ***weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable*** *[...], as well as of 'blind' weapons. [...]"*[62] (Para. 7, emphasis added.)

Setting aside the reasons for the way the Opinion has been formulated and based on the statements of the judges themselves, the majority found nuclear weapons to be indiscriminate in nature primarily by virtue of their pernicious uncontrollable effects which meant that no proper distinction could be made between civilians and civilian objects, on the one hand, and combatants and military objectives on the other. As such this interpretation will be useful for the evaluation of other weapons.

bb) Remarks concerning the mental element

There seems to be no case law on the mental element of using weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate.

Art. 8 (2) (b) (xxiii) - Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations

1. Results from the sources

Material elements

(1) The perpetrator used the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.

Mental element

(2) The perpetrator acted wilfully.

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[61] Dissenting Opinion of Judge Weeramantry, III. 10. (b).

[62] *Ibid.* For the resolution, see Annuaire de l'IDI, Vol. II, 1969, p. 377.

2. Commentary

a) Treaty reference of the war crime

The terms "Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations" are derived from various provisions, in particular Arts. 23 GC III, 28 GC IV, and 51 (7) AP I.

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. However, certain other sources may be helpful in interpreting various elements of this offence.

aa) Remarks concerning the material element

Art. 23 (1) GC III contains a specific rule with respect to prisoners of war:

> *"No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations."*

Art. 28 GC IV specifically treats protected persons under GC IV:

> *"The presence of a protected person may not be used to render certain points or areas immune from military operations."*

Art. 51 (7) AP I, which reads as follows:

> *"The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.",*

affords measures of protection to the whole of the civilian population and all civilians, thus extending to them measures which already exist for the two above mentioned categories of persons: prisoners of war and civilians protected by the fourth GC.

According to the ICRC Commentary for this provision,

> *"This paragraph develops and clarifies these various rules. The term "movements" in particular is a new one; this is intended to cover cases where the civilian population moves of its own accord. The second sentence concerns cases where the movement of the population takes place in accordance with instructions from the competent authorities, and is particularly concerned with movements ordered by an Occupying Power, although it certainly also applies to transfers of prisoners of war, and*

civilian enemy subjects ordered by the authorities of a belligerent Power to move within its own territory."[63]

N.B. Art. 19 GC I and Art. 12 (4) AP I contain a similar rule with regard to medical units.

Turning to cases where these principles have been discussed, in the *Karadzic and Mladic* case at the ICTY, the accused were charged with *"taking United Nations Peacekeepers hostage and using them as 'human shields'"*. Therefore, the accused were *"considered to be responsible for grave breaches of the Geneva Conventions (counts 13 and 15) and violations of the laws and customs of war (counts 14 and 16)"*.[64] The ICTY Trial Chamber (Rule 61 proceeding) stated in its decision that

"Bosnian Serb forces selected United Nations military observers in the Pale region and used them as 'human shields'. Those observers were tied to potential targets of NATO air-strikes, specifically the munitions depot [...], the radar facility site [...] and a nearby communication centre."[65]

In the *K. Student case* before the British Military Court, the accused was charged of using *"British prisoners of war as a screen for the advance of German troops [...] resulting in at least six of these British prisoners of war being killed."*[66] For the *actus reus* Arts. 2, 7, 27, 31, 32 of the 1929 Geneva Convention relative to the Treatment of Prisoners of War were cited.[67]

In the *W. von Leeb and others case* a U.S. tribunal found:

"To use prisoners of war as a shield for the troops is contrary to international law."[68]

N.B. While the above-cited prohibitions address the deliberate using of human shields for military operations, Art. 58 AP I has to be distinguished from that rule. The latter provision deals with precautionary measures to be taken to remove the population from the vicinity of military objectives; it stipulates:

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63 Pilloud/Pictet, in: Commentary on the AP, Art. 51, No. 1988, p. 627.

64 ILR Vol. 108, para. 20, p. 91. In the indictment the ICTY Prosecution qualified the acts as follows:
*"**Count 13**: a **GRAVE BREACH** as recognised by Articles 2(h) (taking civilians as hostage), 7 (1) and 7 (3) of the Statute of the Tribunal.*
***Count 14**: a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR** (taking of hostages) as recognised by Articles 3, 7 (1) and 7 (3) of the Statute of the Tribunal.*
*In regard to the UN peacekeepers used as "human shields" on 26 and 27 May 1995, **RADOVAN KARADZIC** and **RATKO MLADIC**, by their acts and omissions, committed:*
***Count 15**: a **GRAVE BREACH** as recognised by Articles 2 (b) (inhuman treatment), 7 (1) and 7 (3) of the Statute of the Tribunal.*
***Count 16**: a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR** (cruel treatment) as recognised by Articles 3, 7(1) and 7(3) of the Statute of the Tribunal."*

65 ILR Vol. 108, para. 20, p. 96.

66 British Military Court, UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. IV, p. 118.

67 *Ibid.*, p. 121.

68 U.S. Military Court, UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. XII, p. 104.

"The Parties to the conflict shall, to the maximum extent feasible:

(a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;

(b) avoid locating military objectives within or near densely populated areas;

(c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations."

Art. 58 AP I is based on the concept that belligerents may expect their adversaries to conduct themselves fully in accordance with their treaty obligations and to respect the civilian population, but they themselves must also cooperate by taking all possible precautions for the benefit of their own population as is in any case in their own interest. The obligation to take precautions to protect the civilian population and civilian objects against the collateral effects of attacks is a complementary one shared by both sides to an armed conflict in implementation of the principle of distinction. Within their respective capabilities, each is obliged to do what is feasible to avoid or minimize collateral effects of attacks which cause loss of civilian life or damage to civilian property. Art. 58 AP I is the provision applicable to the Party having control over the civilian population to do what is feasible to attain this goal. It is complementary to, and interdependent with, Art. 57 AP I which implements, in somewhat more mandatory terms, the obligations of the attacking Party in this regard. However, a violation of Art. 58 AP I does not amount to the crime under consideration here.

bb) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

Art. 8 (2) (b) (xxiv) - Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law

1. Results from the sources

Material elements

(1) The perpetrator unlawfully directed an attack against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law.

Mental element

(2) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

There is no single treaty reference for this war crime. It encompasses various prohibitions of attack as contained in the GC and AP I. The relevant provisions are cited below.

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. However, certain other sources may be helpful in interpreting various elements of this offence.

aa) Remarks concerning the material element

Attack

The term attack is defined in Art. 49 (1) AP I and *"means acts of violence against the adversary, whether in offence or in defence"*.

As it has been pointed out above, the notion of attack as defined in this provision refers to the use of armed force to carry out a military operation during the course of an armed conflict. Therefore, the terms "offence" and "defence" must be understood independently from the meaning attributed to them by the law regulating the recourse to force under the UN Charter.

Buildings, material, medical units and transport, and personnel protected by the GC and AP I using the distinctive emblems of the Geneva Conventions in conformity with international law

The GC and AP I contain a wide range of provisions regulating the protection of specific buildings, material, medical units and transport, and personnel against attacks and their legitimate use of the distinctive emblem of the GC, in particular:

> Art. 24 GC I:
> *"Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances."*
>
> Art. 25 GC I:
> *"Members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick shall likewise be respected and protected if they are carrying out these duties at the time when they come into contact with the enemy or fall into his hands."*

Art. 26 GC I:
"The staff of National Red Cross Societies and that of other Voluntary Aid Societies, duly recognized and authorized by their Governments, who may be employed on the same duties as the personnel named in Article 24, are placed on the same footing as the personnel named in the said Article, provided that the staff of such societies are subject to military laws and regulations. [...]"

Art. 27 GC I:
"A recognized Society of a neutral country can only lend the assistance of its medical personnel and units to a Party to the conflict with the previous consent of its own Government and the authorization of the Party to the conflict concerned. That personnel and those units shall be placed under the control of that Party to the conflict. [...]
The members of the personnel named in the first paragraph shall be duly furnished with the identity cards provided for in Article 40 before leaving the neutral country to which they belong."

Art. 36 GC I:[69]
"Medical aircraft, that is to say, aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment, shall not be attacked, but shall be respected by the belligerents, while flying at heights, times and on routes specifically agreed upon between the belligerents concerned.
They shall bear, clearly marked, the distinctive emblem prescribed in Article 38, together with their national colours on their lower, upper and lateral surfaces. [...]"
N.B. It has to be indicated that these rules on medical aircraft are outdated. The present law is reflected in the provisions of AP I mentioned later on.

Art. 39 GC I:[70]
"Under the direction of the competent military authority, the emblem shall be displayed on the flags, armlets and on all equipment employed in the Medical Service."

Art. 40 GC I:
"The personnel designated in Article 24 [medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces] and in Articles 26 [staff of National Red Cross Societies and that of other Voluntary Aid Societies, duly recognized and authorized by their Governments, who may be employed on the same duties as the personnel named in Article 24] and 27 [medical personnel of a recognized Society of a neutral country] shall wear, affixed to the left arm, a water-resistant armlet bearing the distinctive emblem, issued and stamped by the military authority."

Art. 41 GC I:
"The personnel designated in Article 25 [members of the armed forces specially trained for employment as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick] shall wear, but only while carrying out medical duties, a white armlet bearing in its

[69] See also Art. 39 GC II.
[70] See also Art. 41 GC II.

centre the distinctive sign in miniature; the armlet shall be issued and stamped by the military authority.
Military identity documents to be carried by this type of personnel shall specify what special training they have received, the temporary character of the duties they are engaged upon, and their authority for wearing the armlet."

Art. 42 GC I:
"The distinctive flag of the Convention shall be hoisted only over such medical units and establishments as are entitled to be respected under the Convention, and only with the consent of the military authorities. In mobile units, as in fixed establishments, it may be accompanied by the national flag of the Party to the conflict to which the unit or establishment belongs.
Nevertheless, medical units which have fallen into the hands of the enemy shall not fly any flag other than that of the Convention. Parties to the conflict shall take the necessary steps, in so far as military considerations permit, to make the distinctive emblems indicating medical units and establishments clearly visible to the enemy land, air or naval forces, in order to obviate the possibility of any hostile action."

Art. 43 GC I:
"The medical units belonging to neutral countries, which may have been authorized to lend their services to a belligerent under the conditions laid down in Article 27, shall fly, along with the flag of the Convention, the national flag of that belligerent, wherever the latter makes use of the faculty conferred on him by Article 42. [...]"

Art. 44 GC I:
"With the exception of the cases mentioned in the following paragraphs of the present Article, the emblem of the red cross on a white ground and the words 'Red Cross' or 'Geneva Cross' may not be employed, either in time of peace or in time of wa xcept to indicate or to protect the medical units and establishments, the personnel and material protected by the present Convention and other Conventions dealing with similar matters. The same shall apply to the emblems mentioned in Article 38, second paragraph, in respect of the countries which use them. The National Red Cross Societies and other societies designated in Article 26 shall have the right to use the distinctive emblem conferring the protection of the Convention only within the framework of the present paragraph.
Furthermore, National Red Cross (Red Crescent, Red Lion and Sun[71]) Societies may, in time of peace, in accordance with their rational legislation, make use of the name and emblem of the Red Cross for their other activities which are in conformity with the principles laid down by the International Red Cross Conferences. When those activities are carried out in time of war, the conditions for the use of the emblem shall be such that it cannot be considered as conferring the protection of the Convention; the emblem shall be comparatively small in size and may not be placed on armlets or on the roofs of buildings.
The international Red Cross organizations and their duly authorized personnel shall be permitted to make use, at all times, of the emblem of the red cross on a white ground.
[...]"

[71] Since 1980, this emblem is no longer used.

Art. 42 GC II:

"The personnel designated in Articles 36 [religious, medical and hospital personnel of hospital ships and their crews] and 37 [religious, medical and hospital personnel assigned to the medical or spiritual care of the persons designated in Articles 12 and 13] shall wear, affixed to the left arm, a water-resistant armlet bearing the distinctive emblem, issued and stamped by the military authority.

Such personnel [...] shall also carry a special identity card bearing the distinctive emblem.[...]"

Art. 43 GC II:

"The ships designated in Articles 22 [Military hospital ships], 24 [Hospital ships utilized by National Red Cross Societies, by officially recognized relief societies or by private persons], 25 [Hospital ships utilized by National Red Cross Societies, officially recognized relief societies, or private persons of neutral countries] and 27 [small craft employed by the State or by the officially recognized lifeboat institutions for coastal rescue operations] shall be distinctively marked as follows:

(a) All exterior surfaces shall be white.

(b) One or more dark red crosses, as large as possible, shall be painted and displayed on each side of the hull and on the horizontal surfaces, so placed as to afford the greatest possible visibility from the sea and from the air.

All hospital ships shall make themselves known by hoisting their national flag and further, if they belong to a neutral state, the flag of the Party to the conflict whose direction they have accepted. A white flag with a red cross shall be flown at the mainmast as high as possible.

Lifeboats of hospital ships, coastal lifeboats and au small craft used by the Medical Service shall be painted white with dark red crosses prominently displayed and shall, in general, comply with the identification system prescribed above for hospital ships.

[...]

All the provisions in this Article relating to the red cross shall apply equally to the other emblems mentioned in Article 41."

Art. 44 GC II:

"The distinguishing signs referred to in Article 43 can only be used, whether in time of peace or war, for indicating or protecting the ships therein mentioned, except as may be provided in any other international Convention or by agreement between all the Parties to the conflict concerned."

Art. 18 GC IV:

"Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.

States which are Parties to a conflict shall provide all civilian hospitals with certificates showing that they are civilian hospitals and that the buildings which they occupy are not used for any purpose which would deprive these hospitals of protection in accordance with Article 19.

Civilian hospitals shall be marked by means of the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, but only if so authorized by the State.

The Parties to the conflict shall, in so far as military considerations permit, take the necessary steps to make the distinctive emblems indicating civilian hospitals clearly

visible to the enemy land, air and naval forces in order to obviate the possibility of any hostile action.
In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives."

Art. 19 GC IV:
"The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded.
The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants and not yet been handed to the proper service, shall not be considered to be acts harmful to the enemy."

Art. 20 GC IV:
"Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases shall be respected and protected.
In occupied territory and in zones of military operations, the above personnel shall be recognizable by means of an identity card certifying their status, bearing the photograph of the holder and embossed with the stamp of the responsible authority, and also by means of a stamped, water-resistant armlet which they shall wear on the left arm while carrying out their duties. This armlet shall be issued by the State and shall bear the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.
Other personnel who are engaged in the operation and administration of civilian hospitals shall be entitled to respect and protection and to wear the armlet, as provided in and under the conditions prescribed in this Article, while they are employed on such duties. The identity card shall state the duties on which they are employed."

Art. 21 GC IV:
"Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases, shall be respected and protected in the same manner as the hospitals provided for in Article 18, and shall be marked, with the consent of the State, by the display of the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949."

Art. 22 GC IV:
"Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases or for the transport of medical personnel and equipment, shall not be attacked, but shall be respected while flying at heights, times and on routes specifically agreed upon between all the Parties to the conflict concerned.

They may be marked with the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949."
N.B. It has to be indicated that these rules are outdated. The present law is reflected in the provisions of AP I mentioned later on.

Art. 6 of Annex I to GC IV:
"Hospital and safety zones shall be marked by means of oblique red bands on a white ground, placed on the buildings and outer precincts.
Zones reserved exclusively for the wounded and sick may be marked by means of the Red Cross (Red Crescent, Red Lion and Sun[72]) emblem on a white ground."

The following definitions of Art. 8 AP I give useful guidance to clarify the terms:

"(c) 'medical personnel' means those persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under sub-paragraph (e) or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary. The term includes:
(i) medical personnel of a Party to the conflict, whether military or civilian, including those described in the First and Second Conventions, and those assigned to civil defence organizations;
(ii) medical personnel of national Red Cross (Red Crescent, Red Lion and Sun[73]) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict;
(iii) medical personnel of medical units or medical transports described in Article 9, paragraph 2;
[...]
(e) 'medical units' means establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment -- including first-aid treatment -- of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary;
(f) 'medical transportation' means the conveyance by land, water or air of the wounded, sick, shipwrecked, medical personnel, religious personnel, medical equipment or medical supplies protected by the Conventions and by this Protocol;
(g) 'medical transports' means any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a Party to the conflict;
(h) 'medical vehicles' means any medical transports by land;
(i) 'medical ships and craft' means any medical transports by water;
(j) 'medical aircraft' means any medical transports by air;
(k) 'permanent medical personnel', 'permanent medical units' and 'permanent medical transports' mean those assigned exclusively to medical purposes for an indeterminate period. 'Temporary medical personnel', 'temporary medical units' and 'temporary medical transports' mean those devoted exclusively to medical purposes for limited periods during the whole of such periods. Unless otherwise specified, the

[72] See previous footnote.
[73] See previous footnotes.

terms 'medical personnel', 'medical units' and 'medical transports' cover both permanent and temporary categories;"

Art. 12 AP I - Protection of medical units

"1. Medical units shall be respected and protected at all times and shall not be the object of attack.

2. Paragraph 1 shall apply to civilian medical units, provided that they:

(a) belong to one of the Parties to the conflict;

(b) are recognized and authorized by the competent authority of one of the Parties to the conflict; or

(c) are authorized in conformity with Article 9, paragraph 2, of this Protocol or Article 27 of the First Convention.

3. The Parties to the conflict are invited to notify each other of the location of their fixed medical units. The absence of such notification shall not exempt any of the Parties from the obligation to comply with the provisions of paragraph 1. [...]"

Art. 13 AP I - Discontinuance of protection of civilian medical units

"1. The protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

2. The following shall not be considered as acts harmful to the enemy:

(a) that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;

(b) that the unit is guarded by a picket or by sentries or by an escort;

(c) that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;

(d) that members of the armed forces or other combatants are in the unit for medical reasons."

Art. 15 AP I - Protection of civilian medical and religious personnel

"1. Civilian medical personnel shall be respected and protected. [...[

5. Civilian religious personnel shall be respected and protected. The provisions of the Conventions and of this Protocol concerning the protection and identification of medical personnel shall apply equally to such persons."

Art. 18 AP I - Identification:

"1. Each Party to the conflict shall endeavour to ensure that medical and religious personnel and medical units and transports are identifiable.

[...]

3. In occupied territory and in areas where fighting is taking place or is likely to take place, civilian medical personnel and civilian religious personnel should be recognizable by the distinctive emblem and an identity card certifying their status.

4. With the consent of the competent authority, medical units and transports shall be marked by the distinctive emblem. The ships and craft referred to in Article 22 of this Protocol shall be marked in accordance with the provisions of the Second Convention.

5. In addition to the distinctive emblem, a Party to the conflict may, as provided in Chapter III of Annex I to this Protocol, authorize the use of distinctive signals to identify medical units and transports. Exceptionally, in the special cases covered in

that Chapter, medical transports may use distinctive signals without displaying the distinctive emblem.
6. The application of the provisions of paragraphs 1 to 5 of this article is governed by Chapters I to III of Annex I to this Protocol. Signals designated in Chapter III of the Annex for the exclusive use of medical units and transports shall not, except as provided therein, be used for any purpose other than to identify the medical units and transports specified in that Chapter. [...]"

Art. 23 AP I - Other medical ships and craft
"1. Medical ships and craft other than those referred to in Article 22 of this Protocol and Article 38 of the Second Convention shall, whether at sea or in other waters, be respected and protected in the same way as mobile medical units under the Conventions and this Protocol. [...] such vessels should be marked with the distinctive emblem and as far as possible comply with the second paragraph of Article 43 of the Second Convention.
2. The ships and craft referred to in paragraph 1 shall remain subject to the laws of war. Any warship on the surface able immediately to enforce its command may order them to stop, order them off, or make them take a certain course, and they shall obey every such command. Such ships and craft may not in any other way be diverted from their medical mission so long as they are needed for the wounded, sick and shipwrecked on board.
3. The protection provided in paragraph 1 shall cease only under the conditions set out in Articles 34 and 35 of the Second Convention. A clear refusal to obey a command given in accordance with paragraph 2 shall be an act harmful to the enemy under Article 34 of the Second Convention.
[...]"

Art. 24 AP I - Protection of medical Aircraft
"Medical aircraft shall be respected and protected, subject to the provisions of this Part."
The details of the protections are to be found in Arts. 25-31. In contrast to GC IV these rules specifically distinguish between three areas: Art. 25 AP I - Medical aircraft in areas not controlled by an adverse Party; Art. 26 AP I - Medical aircraft in contact or similar zones; Art. 27 AP I - Medical aircraft in areas controlled by an adverse Party.

N.B. Directing attacks against persons or objects using the signals as contained in the revised Annex I of 1993 to AP I in conformity with the previous rules constituting protected status should also fall within the scope of the crime under the Statute. This follows from the rationale of the Annex as it is reflected in Art. 1:

"Article 1 - General provisions
1. The regulations concerning identification in this Annex implement the relevant provisions of the Geneva Conventions and the Protocol; they are intended to facilitate the identification of personnel, material, units, transports and installations protected under the Geneva Conventions and the Protocol.
2. These rules do not in and of themselves establish the right to protection. This right is governed by the relevant articles in the Conventions and the Protocol.

3. The competent authorities may, subject to the relevant provisions of the Geneva Conventions and the Protocol, at all times regulate the use, display, illumination and detectability of the distinctive emblems and signals.
4. The High Contracting Parties and in particular the Parties to the conflict are invited at all times to agree upon additional or other signals, means or systems which enhance the possibility of identification and take full advantage of technological developments in this field. "

The provisions of the Annex do not enlarge the protection of persons or objects. They are only intended to facilitate the identification of personnel, material, units, transports and installations protected under the Geneva Conventions and the Protocol.[74] Since the protection is only determined by the substantive provisions of the GC and AP, attacks against such protected objects or persons should also fall under this crime if they use the signals defined in this Annex I to AP I. However, this must be limited to situations in which the attacker has the technical capacity to receive the signals. This restriction may be derived from Art. 18 (2) AP I which provides:

"2. Each Party to the conflict shall also endeavour to adopt and to implement methods and procedures which will make it possible to recognize medical units and transports which use the distinctive emblem and distinctive signals."

In this paragraph there is no "obligation" for the Parties to the conflict to adopt adequate methods and procedures. The reason is that it did not seem desirable to impose an absolute obligation which would involve excessively onerous financial or technical burdens for certain States or other Parties to the conflict. Thus States are merely urged to "endeavour", i.e., to do all they can, to fulfil the obligation laid down here. Based on that rationale, the above-made restriction is necessary. An attack against protected objects or personnel in the sense of this Article of the ICC Statute amounts only to a war crime if the technical means for identification were available.

bb) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

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[74] See also in this regard Sandoz, in: Commentary on the AP, Art. 8, No. 404, p. 135:
"It had already become clear, even during the first session of the Conference of Government Experts in 1971, that the problem of the security of medical transports could only be resolved by finding solutions adapted to 'modern means of marking, pinpointing and identification'. In fact it is no longer possible today to base effective protection solely on a visual distinctive emblem." **(footnote omitted).**

Art. 8 (2) (b) (xxv) - Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions

1. Results from the sources

Material elements

(1) The perpetrator used starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including impeding relief supplies as provided for under the Geneva Conventions.

Mental element

(2) The perpetrator intentionally used starvation as a method of warfare and wilfully deprived them of objects indispensable to their survival.

2. Commentary

a) Treaty reference of the war crime

The terms "Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions" are derived to a large extent from Art. 54 AP I.

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. However, certain other sources may be helpful in interpreting various elements of this offence.

aa) Remarks concerning the material element

(1) Civilians

According to Art. 50 (1) AP I

> *"A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.*

(2) Starvation as a method of warfare

The ICRC Commentary on Art. 54 AP I states in this regard:

> *"The term 'starvation' is generally understood by everyone.*[75] *To use it as a method of warfare would be to provoke it deliberately, causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies. [...]*
> *Starvation is referred to here as a method of warfare, i.e., a weapon to annihilate or weaken the population."*[76]

The principle prohibiting starvation as contained in Art. 54 AP I is applicable both in occupied territories and in territories that are not occupied.

(3) Depriving of objects indispensable to their survival

The term "depriving" encompasses a large variety of acts or omissions. Examples may be found in Art. 54 (2) AP I: *"to attack, destroy, remove or render useless"*. Another conduct is mentioned in the Statute itself: *"impeding relief supplies"*. As has been indicated by the ICRC Commentary to Art. 54 AP I

> *"It should be noted that the verbs "attack", "destroy", "remove" and "render useless" are used in order to cover all possibilities, including pollution, by chemical or other agents, of water reservoirs, or destruction of crops by defoliants, and also because the verb "attack" refers, either in offence or defence, to acts of violence against the adversary, according to Article 49 '(Definition of attacks and scope of application)', paragraph 1."*[77]

The same provision contains also a non-exhaustive list of objects indispensable to the survival of the civilian population: *"food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works"*.

Art. 54 (3) and (5) AP I, however, contain some exceptions:

> *"3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:*
> *(a) as sustenance solely for the members of its armed forces; or*
> *(b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement. [...]*
> *5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity."*

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[75] Starvation is defined by the Shorter Oxford English Dictionary (1973) as the action of starving or subjecting to famine, i.e., to cause to perish of hunger; to deprive of or *"keep scantily supplied with food"* (p. 2111). [...]

[76] Pilloud/Pictet, in: Commentary on the AP, Art. 54, Nos. 2089 *et seq.*, p. 653.

[77] Pilloud/Pictet, in: Commentary on the AP, Art. 54, No. 2101, p. 655.

Paragraph 3 (b) shows, that even if the objects indispensable to the survival of the civilian population were used in direct support of military action, the adverse Party should, when using force, ensure that the population is not reduced to starvation or compelled to move.

These rules obviously have an effect on sieges and blockades which cannot be undertaken for the purpose of starving the civilian population or denying their essential supplies, This is illustrated by the rules relating to blockade in naval warfare in the San Remo Manual:

> *"The declaration or establishment of a blockade is prohibited if:*
> *(a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or*
> *(b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade."*[78]

Relief provisions as indicated below supplement these rules.

(4) Including impeding relief supplies as provided for under the Geneva Conventions

The following provisions contained in the GC and AP I specifically address relief supplies:

- **General provisions relating to relief in favour of the civilian population**

Art. 23 GC IV:
"Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.
The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:
(a) that the consignments may be diverted from their destination,
(b) that the control may not be effective, or
(c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.
The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.
Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed."

[78] San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press, 1995, para. 102.

This provision is supplemented by Arts. 70 and 71 AP I, which apply to the civilian population as defined in AP I (Art. 68 AP I) and which more closely reflect modern customary international law than the rather restrictive article in GC IV:

Art. 70 AP I - Relief actions

"1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.

2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.

3. The Parties to the conflict and each High Contracting Party which allows the passage of relief consignments, equipment and personnel in accordance with paragraph 2:

(a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;

(b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;

(c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.

4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.

5. The Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international co-ordination of the relief actions referred to in paragraph 1."

Art. 71 AP I - Personnel participating in relief actions

"1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.

2. Such personnel shall be respected and protected.

3. Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel referred to in paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

4. Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated."

Paras. 103-104 of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea:

"103. If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:
(a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; and
(b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.

104. The blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted."[79]

- **Relief to the civilian population in Occupied Territories**

Art. 55 GC IV:

"To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.
The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods. [...]"

Art. 59 GC IV:

"If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.
Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.
All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.
A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power."

[79] San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press, 1995.

Art. 60 GC IV:
"Relief consignments shall in no way relieve the Occupying Power of any of its responsibilities under Articles 55, 56 and 59. The Occupying Power shall in no way whatsoever divert relief consignments from the purpose for which they are intended, except in cases of urgent necessity, in the interests of the population of the occupied territory and with the consent of the Protecting Power."

Art. 61 GC IV:
"The distribution of the relief consignments referred to in the foregoing Articles shall be carried out with the cooperation and under the supervision of the Protecting Power. This duty may also be delegated, by agreement between the Occupying Power and the Protecting Power, to a neutral Power, to the International Committee of the Red Cross or to any other impartial humanitarian body.
Such consignments shall be exempt in occupied territory from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory. The Occupying Power shall facilitate the rapid distribution of these consignments.
All Contracting Parties shall endeavour to permit the transit and transport, free of charge, of such relief consignments on their way to occupied territories."

Art. 62 GC IV:
"Subject to imperative reasons of security, protected persons in occupied territories shall be permitted to receive the individual relief consignments sent to them."

These rules are supplemented by Art. 69 AP I - Basic needs in occupied territories which apply to the civilian population as defined in AP I (Art. 68 AP I):
"1. In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.
2. Relief actions for the benefit of the civilian population of occupied territories are governed by Articles 59, 60, 61, 62, 108, 109, 110 and 111 of the Fourth Convention, and by Article 71 of this Protocol, and shall be implemented without delay."

- **Specific rules on relief for detained persons are contained in Arts. 108 *et seq.* and 142 GC IV**

Art. 108 GC IV contains the general principles:

"Internees shall be allowed to receive, by post or by any other means, individual parcels or collective shipments containing in particular foodstuffs, clothing, medical supplies, [...]. Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.
Should military necessity require the quantity of such shipments to be limited, due notice thereof shall be given to the Protecting Power and to the International Committee of the Red Cross, or to any other organization giving assistance to the internees and responsible for the forwarding of such shipments.
The conditions for the sending of individual parcels and collective shipments shall, if necessary, be the subject of special agreements between the Powers concerned,

which may in no case delay the receipt by the internees of relief supplies. Parcels of clothing and foodstuffs may not include books. Medical relief supplies shall, as a rule, be sent in collective parcels."

Arts. 109 et seq. GC IV explain in detail how Art. 108 GC IV is to be implemented.

In addition, Art. 142 GC IV provides:
"Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organizations assisting the protected persons, shall receive from these Powers, for themselves or their duly accredited agents, all facilities for [...] for distributing relief supplies [...]. Such societies or organizations may be constituted in the territory of the Detaining Power, or in any other country, or they may have an international character.
The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision, on condition, however, that such limitation shall not hinder the supply of effective and adequate relief to all protected persons.
The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times."

- **In addition to these rules GC III contains special provisions on relief to prisoners of war**

Art. 72 GC III:
"Prisoners of war shall be allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, foodstuffs, [...]
Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.
The only limits which may be placed on these shipments shall be those proposed by the Protecting Power in the interest of the prisoners themselves, or by the International Committee of the Red Cross or any other organization giving assistance to the prisoners, in respect of their own shipments only, on account of exceptional strain on transport or communications.
The conditions for the sending of individual parcels and collective relief shall, if necessary, be the subject of special agreements between the Powers concerned, which may in no case delay the receipt by the prisoners of relief supplies. [...]"

With respect to collective relieve shipments see Art. 73 GC III + Annex III. Regulations Concerning Collective Relief.

Art. 74 GC III:
"All relief shipments for prisoners of war shall be exempt from import, customs and other dues.
[...] relief shipments [...] shall be exempt from any postal dues, both in the countries of origin and destination, and in intermediate countries.
If relief shipments intended for prisoners of war cannot be sent through the post office by reason of weight or for any other cause, the cost of transportation shall be borne by the Detaining Power in all the territories under its control. The other Powers party to the Convention shall bear the cost of transport in their respective territories. In the absence of special agreements between the Parties concerned, the

costs connected with transport of such shipments, other than costs covered by the above exemption, shall be charged to the senders. [...]"

Art. 75 GC III:
"Should military operations prevent the Powers concerned from fulfilling their obligation to assure the transport of the shipments referred to in Articles 70, 71, 72 and 77, the Protecting Powers concerned, the International Committee of the Red Cross or any other organization duly approved by the Parties to the conflict may undertake to ensure the conveyance of such shipments by suitable means (railway wagons, motor vehicles, vessels or aircraft, etc.). For this purpose, the High Contracting Parties shall endeavour to supply them with such transport and to allow its circulation, especially by granting the necessary safe-conducts."

Art. 125 GC III:
"Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organization assisting prisoners of war, shall receive from the said Powers, for themselves and their duly accredited agents, all necessary facilities [...] for distributing relief supplies [...]. Such societies or organizations may be constituted in the territory of the Detaining Power or in any other country, or they may have an international character.
The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision, on condition, however, that such limitation shall not hinder the effective operation of adequate relief to all prisoners of war.
The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times. [...]"

bb) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date. However, the Statute indicates that the use of starvation as a method of warfare has to be "intentionally", while "impeding relief supplies as provided for under the Geneva Conventions" may be committed "wilfully".